IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-757

THE STERLING COLORADO BEEF COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, BURLINGTON NORTHERN INC., et al.,

Appellees.

On Appeal from the United States District Court for the District of Colorado

MOTION TO AFFIRM

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Appellees, Burlington Northern Inc., et al.,[1] pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

[1] The railroad appellees include Burlington Northern Inc., Union Pacific, Illinois Central Gulf, Chicago & North Western Transportation Co., and Milwaukee Road.

STATEMENT

This is a direct appeal from the final judgment and decree entered on August 17, 1976, by a District Court of three judges specially constituted pursuant to 28 U.S.C. Sections 2284 and 2325, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission.

In the late 1960's the nation's railroads conducted a thorough review of the nationwide trailer-on-flat-car (TOFC) meat rate structure. As a result of that review it was decided to restructure the TOFC rates on all traffic originated by the western and southwestern meat packing industry. This tariff proposal, when filed with the Interstate Commerce Commission, was protested by all the major meat packers[2] and suspended for the statutory seven month period. The proceeding was docketed by the Commission as I&S 8536 and assigned for oral hearings, which lasted several weeks.

As part of this proposal the railroads established origin groupings for all traffic moving on the local western rates to Chicago. Of all the meat packers which protested the new rate structure, only appellant Sterling Beef Company directed their protest to the concept of origin grouping.[3] As to Colorado origins, the concept of origin groupings dated from the establishment of TOFC meat rates in 1962, when the railroads initiated such rates from Denver and Pueblo to Chicago. Thereafter, as

[2] These protestants included Oscar Mayer and Co., George A. Hormel & Co., Rath Packing Co., John Morrell & Co., Armour & Co., Swift & Co., Wilson-Sinclair Co., Wilson Certified Foods, Inc., Wilson Beef Traffic Association, Illini Beef Packers Inc., Texas Packers, Sterling Colorado Beef Co., Wilson Beef & Lamb Co., Packerland Packing Co., Colorado Meat Dealers Association, and the Midwest Packers Traffic Association.

[3] See 340 I.C.C. 214, 227.

meat packers, including appellant Sterling Beef, located new plants in Colorado they were all placed in the Colorado group with identical rates to Chicago.

The initial decision of the Commission, by one of its divisions, found that the carriers' proposal, including origin grouping, to be just and reasonable and the new rates became effective as of December 30, 1970. MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORY, 340 I.C.C. 214 (1970).

Certain of the meat packer protestants filed petitions for reconsideration with the entire Commission. Once again, on review, only the appellant, Sterling Beef Company continued to attack the concept of origin groupings. Upon reconsideration, the entire Commission sustained the basic findings of Division 2, including approval of origin groupings. This Commission decision, however, did modify certain of the Division's findings regarding a hold down on the magnitude of percentage increases. MEAT & PHP, TOFC, SWL, WTL, OFFICIAL TERRITORIES, 344 I.C.C. 299 (1973).

Subsequent to this decision the Commission issued additional orders on clarification which required the rail carriers to place Sterling Beef Company in an origin group with Nebraska origins at a rate differential 5¢ below the other Colorado meat packers on the rate to Chicago.

Appellant then brought this action in the U. S. District Court for Colorado, seeking to have that Court order that it was entitled to strictly distance related rates. However, the District Court affirmed the Commission, holding that there is no controlling law requiring that the Commission establish rates which are solely distance related and that there was substantial evidence in the record supporting the determination made by the Commission.

ARGUMENT

The decision of the District Court is plainly correct. The question presented is so unsubstantial as not to need further argument. The appellant correctly states that the judicial review function is one to determine if there is "substantial evidence" to sustain the administrative agency decision. However, appellant conveniently ignores the voluminous evidence of record before the Commission in leaping to the conclusion that there is no "substantial evidence" to support the Commission's findings regarding the origin grouping concept.

Essentially, it was and is appellant's position that it is entitled to strictly distance related rates, regardless of competitive conditions or the cost of service. Courts had traditionally recognized that the Commission has never adopted a doctrinaire position that all rail charges which are not strictly distance related are unlawful.[4] In this case, there was substantial evidence relating to justification for origin groupings under a nationwide TOFC meat rate structure. This evidence consisted of both intermodal competitive factors and market competitive conditions. Specifically, in regard to Colorado origins there was evidence that group rates were

[4] *e.g.* In *New York Central Railroad Co. v. United States*, 207 F. Supp. 483, 490 (1962), Judge Friendly succinctly stated the rationale for this recognition as follows: "One reason is that although distance must have some effect on rail transport cost, the relationship is by no means direct. Even on transportation in the same direction over the same line, a heavy proportion of total cost is represented by originating and terminating expenses, as well as overhead expenses, such as accounting, which do not vary with mileage. When different carriers are involved, still other factors enter into the comparison. Neither has the Commission ever insisted that rates to or from competing markets or ports should cover costs by precisely the same margin." At page 490.

especially appropriate due to the identity of interest among all Colorado meat packers. As Division 2 of the Commission noted in their decision:

> "* * * All the cattle for the plants of Denver, Greeley, Pueblo and Sterling are purchased from the same market and drawn from the same general area, that is, northeastern Colorado. Since it is admitted that labor costs are essentially identical, rail rates and operating efficiency are the only competitive variables between the Colorado meat packing plants." 340 I.C.C. 214, 228.

Indeed, this fact was conceded by appellant's witness in this case. In addition to these market competitive conditions, there was substantial evidence regarding intermodal competitive factors. Division 2 in its decision in this case recognized that TOFC meat rates were first established to meet motor carrier competition in the transportation of fresh meats. 340 I.C.C. 214, 219.

In the decision of the entire Commission in this case this factor was noted as one of the reasons for approving a group rate adjustment. The Commission stated:

> "Shippers in our view are not entitled under the Act to have competitive rail rates at all points. Specifically, we will not prescribe a distance oriented scale of rail rates to compete with prevailing motor carrier rates where (1) the railroads are not obtaining the variable cost from the service, (2) shippers of meat have relied more and more on motor carriers' service and (3) the motor carriers have a distinct service advantage. We consider a greater discretion to adjust rates particularly important for the carriers in situations like those present here where the increases involved will not return excessive profits to the carriers." at p. 322 (App. 36a)

It is clear that appellant's objective in this case is simply to have the Courts declare that all rail carrier rates must be distance related, regardless of their

attempts to recast the issue as one involving lack of substantial evidence to justify the Commission's findings.

As pointed out earlier, this proceeding before the Commission involved a national restructuring of the TOFC meat rate structure and this appellant was the only protestant to attack the origin grouping concept. Naturally, the Commission devoted the major portion of its decision to a consideration of the ramifications of the carriers' nationwide rate adjustment. Therefore, it cannot be rightfully criticized for its consideration of the appellant's position as part of a broader perspective. Clearly, to have granted appellant distance related rates would have undermined the entire nationwide rate adjustment and, in fact, given appellant an additional unfair advantage over other meat packers similarly situated.

Appellant's reference to the prior precedent allegedly established in its earlier complaint case[5] is clearly distinguishable. That case involved a complaint by an individual shipper which was handled by the Commission under its modified procedure regulations. This procedure involves the submission of written statements and argument by both parties with no oral hearings or cross-examination of witnesses. In that case a three-member panel of Commissioners acting as Division 2, in a split two-to-one decision, ordered the carriers to grant Sterling distance related rates to Chicago. This decision was never reviewed by the entire Commission.

In contrast, this case involved several weeks of hearings and a broad review of the entire TOFC meat rate structure. The decision of the entire Commission

[5] *Sterling Colorado Beef co. v. AT&SF R. Co.*, 339 I.C.C. 530 (1971).

was unanimous in regard to the origin grouping concept. The Commission also clearly articulated the reasons for distinguishing its action in this case from that of Division 2 in the earlier *Sterling* complaint case as follows:

> "In *Sterling Colorado Beef Co. v. AT&SF Railway Co.*, 339 I.C.C. 530, Division 2 removed Sterling Colorado from the carriers grouping of that point with Denver, Greeley and Pueblo to give it the benefit of a shorter distance to Chicago. The Division found that the establishment of a group basis for the rates from Sterling to Chicago was not jusitifed whenever rates were established on Docket No. 28300 mileage basis from points in the Colorado origin area to destinations other than Chicago.
>
> "* * * Unlike Sterling, the present proceeding involves a very broad adjustment of the rates; nevertheless, the result reached in this proceeding likewise leaves Sterling in a reasonable relation with all other points. * * *" at pp. 319-320 (App. 33a-34a)

Under the review standard sanctioned by this Court in *Bowman Transportation Inc. v. Arkansas—Best Freight System, Inc., et al.*, 419 U.S. 281 (1974), it is clear that there was a rational basis for the Commission's conclusion in this case and it is evident that the decision was based on a consideration of all relevant factors involved in the national rate structure. Further, if the Commission is to be permitted to continue to exercise its expertise in rate matters, disapproval of strictly distance related rates in a national rate case cannot reasonably be considered a clear error of judgment by the Commission.

CONCLUSION

Wherefore, appellees respectfully submit that this case is of marginal importance in that the questions raised by appellant are so unsubstantial as not to need further argument. Therefore, appellees respectfully move the Court to affirm the judgment entered in this cause by the District Court for the District of Colorado.

Respectfully submitted,

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